

JEROME C. ROTH (State Bar No. 159483)
jerome.roth@mto.com
HOJOON HWANG (State Bar No. 184950)
hojoon.hwang@mto.com
MIRIAM KIM (State Bar No. 238230)
miriam.kim@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

WILLIAM D. TEMKO (State Bar No. 98858)
william.temko@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

*Attorneys for Defendants LG Electronics, Inc.,
LG Electronics U.S.A., Inc. and LG Electronics
Taiwan Co., LTD.*

*Additional Moving Defendants and Counsel
Listed on Signature Pages*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

This Document Relates to:

*Costco Wholesale Corporation v. Hitachi,
Ltd., et al.*, Individual Case No. 11-cv-06397

*Sears, Roebuck and Co. and Kmart Corp v.
Chunghwa Picture Tubes, Ltd., et al.*,
Individual Case No. 11-cv-05514

Office Depot Inc. v. Hitachi Ltd., et al.,
Individual Case No. 11-cv-06276

*Interbond Corporation of America d/b/a
BrandsMart USA v. Hitachi, Ltd., et al.*,
Individual Case No. 11-cv-06275

*P.C. Richard & Son Long Island Corporation
et al. v. Hitachi Ltd., et al.*, Individual Case
No. 12-cv-02648

Case No. Master File No. 3:07-cv-05944-SC

MDL NO. 1917

**DEFENDANTS' JOINT NOTICE OF
MOTION AND MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST
CERTAIN DIRECT ACTION
PLAINTIFFS ON STATE LAW CLAIMS
LIMITED TO INTRASTATE ACTIVITY
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
– Redacted**

[[Proposed] Order filed concurrently herewith]

Judge: Hon. Samuel Conti
Date: February 6, 2015
Time: 10:00 a.m.
Ctmm: 1, 17th Floor

3:07-cv-05944-SC; MDL 1917

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST DIRECT ACTION PLAINTIFFS ON
INTRASTATE CONDUCT GROUNDS

1 *Costco Wholesale Corp. v. Technicolor SA, et*
2 *al.*, No. 13-cv-05723

3 *Sears, Roebuck & Co., et al. v. Technicolor*
4 *SA, et al.*, No. 13-cv-05262

5 *Office Depot, Inc. v. Technicolor, et al.*, No.
6 13-cv-05726

7 *Interbond Corporation of America v.*
8 *Technicolor SA, et al.*, No. 13-cv-05727

9 *P.C. Richard & Son Long Island Corp., et al.*
10 *v. Technicolor SA*, No. 13-cv-05725

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NOTICE OF MOTION AND JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 6, 2015 at 10:00 a.m., or as soon as counsel may be heard thereafter, in Courtroom 1, 17th Floor, San Francisco, California before the Honorable Samuel Conti, the undersigned defendants will move the Court, pursuant to Federal Rule of Civil Procedure 56, for partial summary judgment with respect to certain state law claims of Plaintiffs Costco Wholesale Corporation (“Costco”); Kmart Corp. (“Kmart”); and Office Depot, Inc. (“Office Depot”); Interbond Corporation of America d/b/a BransMart USA (“Interbond”); and MARTA Cooperative of America, Inc. (“MARTA”) (collectively, “Plaintiffs”). Specifically, this motion seeks partial summary judgment on the following claims for relief with the exception of Plaintiffs’ Michigan state law claims against HEDUS and the Philips Defendants:

1. Costco’s Fourth and Fifth Claims for Relief under Arizona and Florida state law;
2. Kmart’s Third Claim for Relief under Michigan state law;
3. Office Depot’s Second Claim for Relief under Florida state law;
4. Interbond’s Second Claim for Relief under Florida state law; and
5. MARTA’s Second Claim for Relief under Arizona and Michigan state law.

This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities, the Declaration of Laura K. Lin in Support of Defendant’s Motion for Partial Summary Judgment Against Certain Direct Action Plaintiffs on Due Process Grounds (“Lin Decl.”), and any materials attached thereto or otherwise found in the record, along with the argument of counsel and such other matters as the Court may consider.

1 Dated: November 7, 2014

Respectfully submitted,

2
3 MUNGER, TOLLES & OLSON LLP

4 By: /s/ Hojoon Hwang

5 JEROME C. ROTH (State Bar No. 159483)

6 jerome.roth@mto.com

HOJOON HWANG (State Bar No. 184950)

7 hojoon.hwang@mto.com

MIRIAM KIM (State Bar No. 238230)

8 miriam.kim@mto.com

MUNGER, TOLLES & OLSON LLP

560 Mission Street, Twenty-Seventh Floor

9 San Francisco, California 94105-2907

10 Telephone: (415) 512-4000

Facsimile: (415) 512-4077

11 WILLIAM D. TEMKO (SBN 098858)

12 William.Temko@mto.com

MUNGER, TOLLES & OLSON LLP

13 355 South Grand Avenue, Thirty-Fifth Floor

Los Angeles, CA 90071-1560

14 Telephone: (213) 683-9100

Facsimile: (213) 687-3702

15 *Attorneys for Defendants LG Electronics, Inc.; LG*

16 *Electronics USA, Inc.; and LG Electronics Taiwan Taipei*

17 *Co., Ltd.*

MEMORANDUM OF POINTS AND AUTHORITIES

QUESTION PRESENTED¹

Whether certain of Plaintiffs' state law claims based on indirect purchases are barred where the laws of the respective states only apply to anticompetitive conduct that occurred *within* that state and Plaintiffs fail to offer any evidence of such conduct?

SUMMARY OF ARGUMENT

Certain Plaintiffs² assert claims pursuant to the laws of states that limit the reach of their antitrust and anticompetitive statutes to conduct occurring within the state. Specifically, Plaintiffs bring state law claims under the laws of the following states that require intrastate conduct: Florida, Arizona, and Michigan. Where Plaintiffs fail to identify anticompetitive conduct within these states, their claims must fail and summary judgment with respect to these claims should be granted in favor of Defendants.

OVERVIEW OF CLAIMS ADDRESSED

Plaintiffs are companies that purchased products containing Cathode Ray Tubes ("CRTs") and resold them directly to consumers or through distribution channels. Plaintiffs allege that Defendants engaged in a conspiracy to fix the prices of CRTs. Along with federal law claims, Plaintiffs allege the following state law claims at issue in this motion:

1. Costco's Fourth and Fifth Claims for Relief under Arizona and Florida state law;³
2. Kmart's Third Claim for Relief under Michigan state law;
3. Office Depot's Second Claim for Relief under Florida state law;
4. Interbond's Second Claim for Relief under Florida state law; and

¹ Lin Declaration Exhibit C describes how Defendants' motions concerning Plaintiffs' state law claims relate to one another. As Exhibit C details, the Court need not consider certain of Defendants' motions if it finds in Defendants' favor on other motions.

² The Plaintiffs at issue in this motion are: Costco, Kmart, Office Depot, Interbond, and MARTA.

³ Panasonic Corporation, Panasonic Corporation of North America and MT Picture Display Co., Ltd. ("MTPD") do not move with respect to Costco's claims, as they are not named in Costco's complaint. The SDI Defendants and Philips Defendants likewise do not move with respect to Costco's claims because Costco does not assert any state law claims against them.

1 5. MARTA's Second Claim for Relief under Arizona and Michigan state law.

2 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

3 In discovery, Plaintiffs identified the alleged anticompetitive conduct at issue by creating
 4 an "Exhibit A," as well as by pointing to Defendants' own discovery responses and generally
 5 referencing all documents produced by any party.⁴ Exhibit A lists alleged anticompetitive
 6 communications by date, location, and individual participants. Plaintiffs purported to identify
 7 which Defendants were affiliated with each entry on Exhibit A, but failed to specify the particular
 8 Defendants by corporate entity. (Thus, for instance, "SDI" is one column on Exhibit A, without
 9 reference to which of the seven SDI Defendants is at issue.) [REDACTED]

10 [REDACTED]⁵
 11 Exhibit A (consistent with all of the discovery in these matters) indicates that substantially
 12 all of the alleged misconduct at issue occurred abroad. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16
 17
 18
 19 ⁴ See, e.g., Lin Decl. Ex. 20 (Office Depot's Objections and Responses to Hitachi Asia, Ltd.'s
 20 First Set of Interrogatories, Response to Interrogatory No. 1 (stating that "[e]vidence supporting
 21 defendants' and their co-conspirators' illegal price fixing agreement includes" various expert
 22 reports and discovery responses by others, and an Exhibit A)). The most recent supplement of this
 23 "Exhibit A" is attached as Exhibit A to the accompanying declaration of Laura K. Lin ("Exhibit
 24 A").

25 ⁵ Exhibit A.

26 ⁶ As described in the Lin Declaration, Defendants created Exhibit B by filtering Plaintiffs' Exhibit
 27 A by location (as identified by Plaintiffs in the second column of their Exhibit A) and selecting
 28 entries that reference, or appear to reference, the United States. See Lin Decl. ¶ 4. In addition,
 Defendants added entries to Exhibit B based on the allegations relating to conduct in the United
 States as cited in the exhibits to the Rebuttal Expert Report of Jerry A. Hausman (Sept. 26, 2014).
Id. These latter entries are designated with the letter "H" in Exhibit B. Although Plaintiffs have
 indicated that their evidence of anticompetitive conduct may arise from all discovery documents
 and responses, Defendants have not located any additional references to Plaintiffs' allegations of
 anticompetitive conduct in the United States.

A. Plaintiffs Have Identified No Evidence of Anticompetitive Conduct Within Florida

Plaintiffs have not identified evidence of any purportedly anticompetitive conduct by Defendants within Florida.⁷

B. Plaintiffs Purport to Have Identified One Instance of Anticompetitive Conduct in Arizona Allegedly Involving Two Defendants

[REDACTED]

C. Plaintiffs Purport to Have Identified Three Instances of Anticompetitive Conduct in Michigan

[REDACTED]

Plaintiffs' purported evidence does not involve any alleged anticompetitive activity by the LG Defendants, the Mitsubishi Defendants, the Toshiba Defendants, or Panasonic Corporation.¹² As to the SDI Defendants, Plaintiffs have [REDACTED]

[REDACTED]

⁷ See Exhibit A; Exhibit B.

⁸ See Exhibit A; Exhibit B.

⁹ Lin Decl. Ex. 24 (HEDUS-CRT00160563 (cited in Exhibit A line 284)).

¹⁰ Lin Decl. Ex. 21 (Deposition of L. Thomas Heiser (March 18 – 19, 2014) at 191:17-193:9).

¹¹ See Exhibit A (lines 857, 1075, 1346); Exhibit B (lines 857, 1075, 1346).

¹² See Exhibit A (lines 857, 1075, 1346); Exhibit B (lines 857, 1075, 1346).

[REDACTED] See Lin Decl. Ex. 28 (MTPD-0576843).

1 [REDACTED]¹³ Further, as to defendant MTPD, [REDACTED]

2 [REDACTED]

3 [REDACTED]¹⁴

4 LEGAL STANDARD

5 Summary judgment is appropriate when there is no genuine issue of material fact and the
6 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving
7 for summary judgment has the initial burden of identifying the absence of a genuine issue of
8 material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *In re Oracle Corp.*
9 *Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

10 Where, as here, the moving party meets its burden, the non-moving party must identify
11 facts showing that a genuine issue for trial exists. *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387
12 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The non-moving party may not rely
13 on the pleadings but must come forward with evidence – affidavits, depositions, answers to
14 interrogatories, or admissions – from which a jury could reasonably render a verdict in its favor.
15 *Id.* (citing *Anderson*, 477 U.S. at 252). “The nonmoving party must show more than the mere
16 existence of a scintilla of evidence” or “some ‘metaphysical doubt’ as to the material facts at
17 issue.” *Id.* (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586
18 (1986)).

19 ARGUMENT

20 I. The Applicable Laws in Florida, Arizona, and Michigan Require Intrastate 21 Anticompetitive Conduct

22 Each of the Relevant States’ laws apply only to anticompetitive conduct that occurred
23 *within* the state.

24 _____

25 ¹³ See Exhibit A (line 1346 (citing Robert O’Brien (Philips) Dep. at 251:20-258:2 and PTC-
26 0004295); Exhibit B (line 1346) (citing same). See also Lin Decl. Ex. 11 (Robert O’Brien
(Philips) Dep. at 251:20-258:2); *id.* Ex. 8 (PTC-00004295).

27 ¹⁴ Exhibit A (line 1075 (citing Iwamoto Dep. at 45-55, 81, 262-64, 359-64); Exhibit B (line 1075)
28 (citing same); see also Lin Decl. Exs. 29, 30 (Shinichi Iwamoto (Feb. 7-8, 2013) Dep. at 45:1-
55:25, 81:1-25, 262:1-264:25, 359:1-364:25); Lin Decl. Ex. 28 (MTPD-0576843).

1 In Florida, indirect purchaser damages are available pursuant to the Florida Deceptive and
 2 Unfair Trade Practices Act (“FDUPTA”). *See Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100
 3 (Fla. Dist. Ct. App. 1996). Florida courts have consistently held that FDUPTA “seeks to prohibit
 4 unfair, deceptive and/or unconscionable practices which have transpired within the territorial
 5 boundaries of [Florida].” *Millennium Commc’ns & Fulfillment, Inc. v. Office of Att’y Gen.*, 761
 6 So.2d 1256, 1262 (Fla. Dist. Ct. App. 2000) (emphasis added); 10A Florida Jurisprudence (2d Ed.
 7 2014) § 165 (“Florida Deceptive and Unfair Trade Practices Act (FDUTPA) applies only to
 8 actions that occurred within the state of Florida.”). As a result, courts interpreting Florida law
 9 have dismissed plaintiffs’ FDUPTA claims where a plaintiff fail to “specify the location of the
 10 conduct to make certain it occurred within the territorial boundaries of Florida.” *Five for Entm’t*
 11 *S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1331 (S.D.Fla. 2012); *see also id.* at 1330 (“FDUTPA
 12 applies only to actions that occurred within the state of Florida.”); *Beaver v. Inkmart, LLC*, 2012
 13 WL 4005970, at *3 (S.D. Fla. Sep. 12, 2012) (dismissing FDUTPA claims “[b]ecause none of the
 14 alleged misconduct occurred within Florida”) (internal quotation marks and citation omitted);
 15 *Carnival Corp. v. Rolls-Royce PLC*, 2009 WL 3861450, at *6 (S.D. Fla. Nov. 17, 2009) (noting
 16 that “FDUTPA applies only to action that occurred within the state of Florida” and dismissing
 17 claims based on actions that occurred outside of Florida).

18 Arizona and Michigan’s antitrust statutes similarly apply only to intrastate anticompetitive
 19 conduct. *See Ariz. Rev. Stat. Ann. § 44-1402* (“A contract, combination or conspiracy between
 20 two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is
 21 *within this state*, is unlawful.” (emphasis added)); Mich. Comp. Laws Ann. § 445.772 (“A
 22 contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize,
 23 trade or commerce *in a relevant market* is unlawful.” (emphasis added)); Mich. Comp. Laws Ann.
 24 § 445.771(b) (“‘Relevant market’ means the geographical area of actual or potential competition
 25 in a line of trade or commerce, all or any part of which is within this state.”). *See also Aurora*
 26 *Cable Commc’ns, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 603 (W.D. Mich. 1989) (the
 27 Michigan antitrust law “parallels the Sherman Antitrust Act as it applies to intrastate conduct”); *In*
 28

1 *re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 407 n.8 (S.D.N.Y. 2011) (finding that
2 Michigan antitrust law requires intrastate conduct).

3 Courts interpreting similar state laws have likewise concluded that plaintiffs must identify
4 anticompetitive conduct *within* the state whose law they seek to apply. *See, e.g., In re Lithium Ion*
5 *Batteries Antitrust Litig.*, 2014 WL 4955377, at * (N.D. Cal. Oct. 2, 2014) (dismissing New
6 Hampshire Consumer Protection Act claim with prejudice where plaintiffs failed to identify
7 anticompetitive conduct within New Hampshire) (citing N.H. Rev. Stat. Ann. § 358-A:2
8 (prohibiting “any unfair method of competition or any unfair or deceptive act or practice in the
9 conduct of any trade or commerce within this state”)).

10 **II. Defendants Are Entitled to Partial Summary Judgment Where Plaintiffs Fail**
11 **to Identify Intrastate Anticompetitive Conduct Within the Respective States**

12 The undisputed material facts show that Plaintiffs fail to satisfy the requirements of
13 Florida, Arizona and Michigan law with respect to some or all Defendants. Plaintiffs have alleged
14 no anticompetitive conduct by any Defendant within Florida and, as a result, Defendants are
15 entitled to partial summary judgment on Plaintiffs’ Florida claims. *See Millennium Commc’ns &*
16 *Fulfillment, Inc.*, 761 So.2d at 1262 (requiring intrastate anticompetitive conduct). Similarly,
17 Defendants are entitled to partial summary judgment on Plaintiffs’ Arizona claims because
18 Plaintiffs fail to identify any alleged anticompetitive conduct by Defendants in Arizona. *See Ariz.*
19 *Rev. Stat. § 44-1402* (requiring intrastate anticompetitive conduct).

20 *Finally*, other than HEDUS and the Philips Defendants (which do not move with respect to
21 the Michigan claims against them), Defendants are entitled to partial summary judgment on
22 Plaintiffs’ Michigan claims. Plaintiffs have not identified any anticompetitive conduct by the LG
23 Defendants, SDI Defendants, or Toshiba Defendants in Michigan. [REDACTED]

24 [REDACTED]
25 [REDACTED]
26 [REDACTED] *See, e.g., In re Citric Acid*
27 *Litig.*, 996 F. Supp. 951, 958 (N.D. Cal. 1998) (holding that where there was no evidence that

28 ¹⁵ Exhibit A (line 1075); Exhibit B (line 1075).

1 conspiratorial action was ever discussed at individual meetings, such meetings could only be
 2 considered circumstantial evidence of conspiracy), *aff'd*, 191 F.3d 1090 (9th Cir. 1999); *In re*
 3 *Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (noting that competitors may
 4 exchange price information for legitimate business reasons); *Supermarket of Homes, Inc. v. San*
 5 *Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1407 (9th Cir. 1986) (same); *Market Force Inc.*
 6 *v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1173 (7th Cir.1990) (“[I]t is well established that
 7 evidence of informal communications among several parties does not unambiguously support an
 8 inference of a conspiracy.”).

9 Accordingly, other than HEDUS and the Philips Defendants, Defendants are entitled to
 10 partial summary judgment on Plaintiffs’ Michigan claims because Plaintiffs fail to identify any
 11 alleged anticompetitive conduct by these Defendants in Michigan. *See Mich. Comp. Laws Ann.*
 12 *§ 445.772* (requiring intrastate anticompetitive conduct).

13 CONCLUSION

14 For the foregoing reasons, Defendants respectively request that this Court award partial
 15 summary judgment in favor of Defendants with respect to the following claims:

- 16 1. Costco’s Fourth and Fifth Claims for Relief under Arizona and Florida state law;
- 17 2. Kmart’s Third Claim for Relief under Michigan state law but not with respect to Kmart’s
 18 Kmart’s Michigan law claims against HEDUS and the Philips Defendants;
- 19 3. Office Depot’s Second Claim for Relief under Florida state law;
- 20 4. Interbond’s Second Claim for Relief under Florida state law; and
- 21 5. MARTA’s Second Claim for Relief under Arizona and Michigan state law, but not with
 22 respect to MARTA’s Michigan law claims against HEDUS and the Philips Defendants.
 23

24
 25 Dated: November 7, 2014

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ Hojoon Hwang

JEROME C. ROTH (State Bar No. 159483)

jerome.roth@mto.com

HOJOON HWANG (State Bar No. 184950)

hojoon.hwang@mto.com

MIRIAM KIM (State Bar No. 238230)

miriam.kim@mto.com

MUNGER, TOLLES & OLSON LLP

560 Mission Street, Twenty-Seventh Floor

San Francisco, California 94105-2907

Telephone: (415) 512-4000

Facsimile: (415) 512-4077

WILLIAM D. TEMKO (SBN 098858)

William.Temko@mto.com

MUNGER, TOLLES & OLSON LLP

355 South Grand Avenue, Thirty-Fifth Floor

Los Angeles, CA 90071-1560

Telephone: (213) 683-9100

Facsimile: (213) 687-3702

*Attorneys for Defendants LG Electronics, Inc.; LG
Electronics USA, Inc.; and LG Electronics Taiwan
Taipei Co., Ltd.*

WINSTON & STRAWN LLP

By: /s/ Jeffrey L. Kessler

JEFFREY L. KESSLER (*pro hac vice*)

JKessler@winston.com

A. PAUL VICTOR (*pro hac vice*)

PVictor@winston.com

ALDO A. BADINI (SBN 257086)

ABadini@winston.com

EVA W. COLE (*pro hac vice*)

EWCole@winston.com

MOLLY M. DONOVAN

MMDonovan@winston.com

WINSTON & STRAWN LLP

200 Park Avenue

New York, NY 10166

Telephone: (212) 294-6700

Facsimile: (212) 294-4700

STEVEN A. REISS (*pro hac vice*)

steven.reiss@weil.com

DAVID L. YOHAI (*pro hac vice*)

david.yohai@weil.com

ADAM C. HEMLOCK (*pro hac vice*)

adam.hemlock@weil.com

WEIL, GOTSHAL & MANGES LLP

767 Fifth Avenue
New York, New York 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

*Attorneys for Defendants Panasonic Corporation
(f/k/a Matsushita Electric Industrial Co., Ltd.), MT
Picture Display Co., Ltd.*

KIRKLAND & ELLIS LLP

By: /s/ Eliot A. Adelson
ELIOT A. ADELSON (SBN 205284)
JAMES MAXWELL COOPER (SBN 284054)
KIRKLAND & ELLIS LLP
555 California Street, 27th Floor
San Francisco, California 94104
Tel: (415) 439-1400
Facsimile: (415) 439-1500
E-mail: eadelson@kirkland.com
E-mail: max.cooper@kirkland.com

JAMES H. MUTCHNIK, P.C. (*pro hac vice*)
KATE WHEATON (*pro hac vice*)
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
Tel: (312) 862-2000
Facsimile: (312) 862-2200

*Attorneys for Defendants Hitachi, Ltd., Hitachi
Displays, Ltd. (n/k/a Japan Display Inc.), Hitachi Asia,
Ltd., Hitachi America, Ltd., and Hitachi Electronic
Devices (USA), Inc.*

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By: /s/ Gary L. Halling
GARY L. HALLING (SBN 66087)
ghalling@sheppardmullin.com
JAMES L. MCGINNIS (SBN 95788)
jmcginnis@sheppardmullin.com
MICHAEL W. SCARBOROUGH (SBN 203524)
mscarbrough@sheppardmullin.com
**SHEPPARD MULLIN RICHTER & HAMPTON
LLP**
Four Embarcadero Center, 17th Floor
San Francisco, California 94111
Telephone: (415) 434-9100
Facsimile: (415) 434-3947

1 *Attorneys for Defendants Samsung SDI America, Inc.;*
2 *Samsung SDI Co., Ltd.; Samsung SDI (Malaysia)*
3 *SDN. BHD.; Samsung SDI Mexico S.A. DE C.V.;*
4 *Samsung SDI Brasil Ltda.; Shenzhen Samsung SDI Co.,*
5 *Ltd. and Tianjin Samsung SDI Co., Ltd.*

6 By: /s/ John M. Taladay
7 JOHN M. TALADAY (*pro hac vice*)
8 john.taladay@bakerbotts.com
9 JOSEPH OSTOYICH (*pro hac vice*)
10 joseph.ostoyich@bakerbotts.com
11 ERIK T. KOONS (*pro hac vice*)
12 erik.koons@bakerbotts.com
13 CHARLES M. MALAISE (*pro hac vice*)
14 charles.malaise@bakerbotts.com
15 **BAKER BOTTS LLP**
16 1299 Pennsylvania Ave., N.W.
17 Washington, DC 20004-2400
18 Telephone: (202) 639-7700
19 Facsimile: (202) 639-7890

20 JON V. SWENSON (SBN 233054)
21 jon.swenson@bakerbotts.com
22 **BAKER BOTTS LLP**
23 1001 Page Mill Road
24 Building One, Suite 200
25 Palo Alto, CA 94304
26 Telephone: (650) 739-7500
27 Facsimile: (650) 739-7699
28 E-mail: jon.swenson@bakerbotts.com

Attorneys for Defendants Koninklijke Philips N.V. and
Philips Electronics North America Corporation

FRESHFIELDS BRUCKHAUS
DERINGER US LLP

By: /s/ Michael Lacovara

Michael Lacovara (209279)
Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue, 31st Floor
New York, NY 10022
Telephone: 212 277 4000
Facsimile: 212 277 4001
Email: michael.lacovara@freshfields.com

TERRY CALVANI (SBN 53260)
Email: terry.calvani@freshfields.com
CHRISTINE LACIAK (*pro hac vice*)
Email: christine.laciak@freshfields.com
RICHARD SNYDER (*pro hac vice*)

Email: richard.snyder@freshfields.com
FRESHFIELDS BRÜCKHAUS DERINGER US LLP
701 Pennsylvania Avenue NW, Suite 600
Washington, DC 20004
Telephone: (202) 777-4565
Facsimile: (202) 777-4555

*Attorneys for Beijing-Matsushita Color CRT Company,
Ltd.*

FAEGRE BAKER DANIELS LLP

By: /s/ Kathy L. Osborn

Kathy L. Osborn (*pro hac vice*)
Ryan M. Hurley (*pro hac vice*)
Faegre Baker Daniels LLP
300 N. Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: +1-317-237-0300
Facsimile: +1-317-237-1000
kathy.osborn@FaegreBD.com
ryan.hurley@FaegreBD.com

Jeffrey S. Roberts (*pro hac vice*)
Email: jeff.roberts@FaegreBD.com
Faegre Baker Daniels LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203
Telephone: (303) 607-3500
Facsimile: (303) 607-3600

Stephen M. Judge (*pro hac vice*)
Email: steve.judge@FaegreBd.com
Faegre Baker Daniels LLP
202 S. Michigan Street, Suite 1400
South Bend, IN 46601
Telephone: (574) 234-4149
Facsimile: (574) 239-1900

*Attorneys for Defendants Thomson SA and
Thomson Consumer Electronics, Inc.*

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Rachel S. Brass
JOEL S. SANDERS (SBN 107234)
jsanders@gibsondunn.com
RACHEL S. BRASS (SBN 219301)
rbrass@gibsondunn.com
AUSTIN V. SCHWING (SBN 211696)
aschwing@gig@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP

555 Mission Street, Suite 3000
San Francisco, California 94105
Tel: (415) 393-8200
Fax: (415) 393-8306

*Attorneys for Defendant Chunghwa Picture Tubes,
Ltd. and Chunghwa Picture Tubes (Malaysia) Sdn.
Bhd.*

SQUIRE PATTON BOGGS (US) LLP

By: /s/ Nathan Lane, III

Nathan Lane, III (CA Bar No. 50961)

Mark C. Dosker (CA Bar No. 114789)

SQUIRE PATTON BOGGS (US) LLP

275 Battery Street, Suite 2600
San Francisco, California 94111
Telephone: (415) 954-0200
Facsimile: (415) 393-9887
E-mail: nathan.lane@squiresanders.com
E-mail: mark.dosker@squiresanders.com

Donald A. Wall (Pro Hac Vice)

SQUIRE PATTON BOGGS (US) LLP

1 East Washington Street, Suite 2700
Phoenix, Arizona 85004
Telephone: + 1 602 528 4005
Facsimile: +1 602 253 8129
Email: donald.wall@squirepb.com

*Attorneys for Defendant Technologies Displays
Americas LLC with respect to all cases except Office
Depot, Inc. v. Technicolor SA, et al. and Sears, Roebuck
and Co., et al. v. Technicolor SA, et al.*

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

By: /s/ Jeffrey I. Zuckerman

Jeffrey I. Zuckerman (Pro Hac Vice)

Ellen Tobin (Pro Hac Vice)

101 Park Avenue
New York, New York 10178
Telephone: 212.696.6000
Facsimile: 212.697.1559
Email: jzuckerman@curtis.com
etobin@curtis.com

Arthur Gaus (SBN 289560)

DILLINGHAM & MURPHY, LLP

601 California Street, Suite 1900
San Francisco, California 94108
Telephone: 415.397.2700
Facsimile: 415.397-3300

Email: asg@dillinghammurphy.com

*Attorneys for Defendant Technologies Displays
Americas LLC*

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